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IN THE

SUPREME COURT OF THE UNITED STATES.

330 U.S. #13

OCTOBER TERM, 1943. ETT-FED

LESTER ETTMAN,
Petitioner,

vs.

FEDERAL LIFE INSURANCE COMPANY,
Respondent.

No. 426

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

SUPPORTING BRIEF.

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No. .....

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

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To the Honorable Harlan Fiske Stone, Chief Justice of the Supreme Court of the United States of America, and to the Associate Justices:

Petitioner, Lester Ettman, an individual, respectfully shows to this Honorable Court:

I.

STATEMENT OF MATTER INVOLVED.

This is a suit at law against respondent on an accident and health insurance policy written and delivered in Missouri to a Missouri resident to recover total and permanent disability benefits due petitioner thereunder for the total loss of sight of both eyes. Diversity of citizenship gave jurisdiction. Under the trial court's charge, which was practically peremptory, the jury returned a verdict for defendant (R. 276). The Circuit Court of Appeals for the Eighth Circuit affirmed (R. 308). The policy provided a disability benefit of $300.00 per month **for life** in the event of the loss of sight of both eyes as a result of accidental injury or sickness (R. 20). At the time suit was filed, the unpaid disability benefits due petitioner totaled $16,200.00, together with interest. Petitioner's application for insurance is dated January 3, 1928; his policy is dated January 17, 1928 (R. 20).

Part 7, paragraph 2, of the policy provides:

> "No statement made by the applicant for insurance, not included herein, shall void the policy or be used in any legal proceeding hereunder."

Part 9, paragraph 8, of the policy provides:

> "The falsity of any statement in the application, materially affecting either the acceptance of the risk or the hazard assumed thereunder, or made with intent to deceive, shall bar all right to recovery under this policy" (R. 15).

Petitioner lost the sight of both eyes prior to January, 1936 (R. 43-44). In 1940, after paying twelve yearly premiums, petitioner discovered, through an insurance agent, that he was entitled to the policy total disability benefits because of said loss of the sight of both eyes and made

claim therefor (R. 239). The Company refused payment and tendered the premiums paid thereon, less $66.55, the refunded premium reduction under the policy coupon plan (R. 20). The Company then (prior to the institution of this instant suit) brought an equity suit in the federal court, to cancel said policy, claiming fraud and misrepresentation made with intent to deceive (R. 50-51); claiming that in the application the petitioner was asked, among some sixty-four subquestions, under question 4, the following: "Have you now or have you ever had any of the following complaints, symptoms or diseases * * * Difficulty with eyesight or hearing? No" (R. 77). The Company also contended that the petitioner was suffering from retinitis pigmentosa, a disease of the eyes, which he intentionally withheld from the Company at the time of the application, and that he had also knowingly withheld information concerning medical attention (R. 11-16). [The trial court in the instant case found that the Company doctor had testified that the word "No" was probably a mistake, as petitioner had informed him of being nearsighted and was wearing glasses (R. 292).] The Company contended that this answer was untrue and knowingly made with intent to deceive. A motion to dismiss said suit was sustained by the trial court, affirmed by the Circuit Court of Appeals for the Eighth Circuit on the ground that after the occurrence of the contingency the defense of fraud and misrepresentation could be asserted at law (R. 54) (120 F. [2d] 837) and this Court denied certiorari (314 U. S. 660). The answer in the present case (R. 10 to 17, inclusive) pleads exactly what was pleaded in said original equity suit to cancel said policy.

Both in the original suit to cancel the policy, and in the defense of the instant suit, the Company relied on "a theory of fraud and misrepresentation made with intent to deceive." We assume that this Court will judicially notice its

own records. The Company's said petition for certiorari filed in the original equity proceeding (this court's cause No. 560, October Term, 1941) sets out the following questions:

> "1. Is an insurance company entitled to invoke the equitable jurisdiction of a United States District Court to cancel or rescind a policy of insurance issued by it in response **to false and fraudulent representations and statements made by the assured, when such false and fraudulent representations are material to the risk insured against?**
>
> "2. Does the opportunity of an insurance company to contest an action at law to recover under a policy of disability insurance, on the ground that the policy was procured **through fraud and misrepresentation** material to the disability claimed deprive the insurance company of its right to maintain a bill in equity to cancel the policy?
>
> "3. Where an insurance company defends against a suit at law to collect disability benefits under an insurance policy on the ground that the policy was **obtained through fraud and misrepresentation, material to the disability claimed, will a judgment establishing fraud** in the procurement of the policy bar any and all subsequent claims for indemnity under the policy, without a showing that the **fraud practiced in the procurement of the policy is material to the contingency upon which said subsequent claim is based?"** (Emphasis ours.)

In the summary of the argument in said petition for certiorari, the Company contended:

> "Under the law of Missouri, fraud and misrepresentation in the procurement of an insurance policy is not a defense to an action to recover under the policy for any disability insured against, unless the fraud and misrepresentation is material to the disability claimed by the policyholder";

and also:

> "petitioner would have to establish not only that respondent procured the policy through fraud and misrepresentation, but that the particular fraud and misrepresentation practiced by him contributed to the loss of his eyesight, because both the federal courts and courts of Missouri have consistently held that an insurance company will not be relieved from paying indemnity under a policy issued by it on the ground that the policy was procured through fraud, unless the fraud was material to the risk insured against, and actually contributed to bring about the contingency or circumstance upon which a claim of liability is based."

The trial court in the instant case took the view that there was "a warranty made by petitioner," and refused instructions offered by both sides based on the issue of "fraud and misrepresentations" (R. 250, 264, 266). The Company defended the suit on the theory that assured had a disease known as retinitis pigmentosa and that said fact was **knowingly concealed.** There was **no evidence** that assured knew that he had said disease. On the contrary, said fact was kept from him by his oculist, Dr. Meyer Wiener, an eminent and very reputable physician. The Court of Appeals held (R. 311) **the verdict was not a determination that the assured knew that he had any eye disease when he applied for the policy or that he was guilty of fraud in making the answers which he made.**

The trial court, in effect, gave a peremptory instruction to find for defendant if the assured **had** said disease, even though he did **not know it,** and specifically instructed the jury that knowledge on his part was immaterial; that if assured **had** said disease there was a breach of "**warranty**" and the assured could not recover (R. 250).

The Court of Appeals based its opinion, herein complained of, on the assumption that the statement was un-

true and material but made **without intent** to deceive and that the insured certified to the truth of the statements made in the application (R. 308).

At the trial (R. 264-5, 269, 292) the trial court and both sides assumed that Section 5843, R. S. Mo. 1939, known as the Misrepresentation Statute, which was also in force at the time of the application, was applicable and governed. It provides:

> "No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons, citizens of this state, shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the **contingency or event** on which the policy is to become due and payable, and whether it so contributed in any case shall be a question for the jury." (Emphasis ours.)

The Court of Appeals, however, stating that the trial court and counsel for both sides had committed a plain error of law in assuming the Misrepresentation Statute applicable (R. 319), held that the above statute had no application (R. 319) in the instant case (in spite of several Missouri cases holding to the contrary), because the Court of Appeals said, there was no "**death benefit**" provided for in the policy in the case at bar; that it would therefore not follow these decisions, in spite of the fact that the only issue involved in the said cases decided by the Missouri courts, was the issue of disability benefits and not death benefits. In so holding, the Court of Appeals said:

> "It is possible that the courts of Missouri may, by construction expand this statute to cover every kind of policy written by a company authorized to write insurance on life, * * * but as yet they have apparently not done so. In the absence of compelling authority, this Court will not rule, intimate or agree that the statute applies to the policy in suit" (R. 320).

The Court of Appeals thereupon held that the common law applied, and that assured's statements in the application were **warranties**; and the question whether said statements were innocently or fraudulently made was not a material issue. Said Court of Appeals also ruled (R. 321) that it is of no consequence that the company **in its pleadings and at the trial**, had assumed that it must prove **insured's intent to deceive the company.**

In the Court of Appeals, petitioner contended: (a) That the Company did not plead or rely on any **warranty** and called attention to the Company's instructions and exceptions to the Court's charge to support said contention (R. pp. 268-271); (b) that there was no warranty; (c) that the Company examined petitioner, knew as much about his condition as petitioner, and is estopped to deny his insurability, the company doctor having examined petitioner's eyes with a light (R. 211), having noticed that petitioner wore thick, heavy glasses, and having testified that he had a chart in the office for examining eyes, but did not use the same on petitioner (R. 164); (d) that the Company waived any additional examination and waived any physical defect, and was put on notice. These points were all supported by Missouri authorities (R. 323-329).

The Court of Appeals refused to pass on any point other than the issue of **warranty**, saying (R. 321): "The other contentions of the insured have been examined, but do not require discussion."

The testimony showed that the petitioner was very active, he bowled, went to ball games, picture shows, played cards, traveled alone on the road, even traveling at night, carried his own luggage, carried on business, and in general did the same things that an ordinary normal person would do, and could see well enough to write until about 1935, some seven years after he had taken out the policy. The Company does not dispute that petitioner did these things (R. 240). After 1929, petitioner acted as manager

for his uncle, who was in the sponge business, when the latter became feeble. Even petitioner's friends did not notice there was anything wrong with his eyes until 1935 (R. 32, 38). After 1935 he could not see to write checks, he could merely sign them (R. 44). Dr. Meyer Wiener, an outstanding oculist, testified that patients come to see him with just a central vision left, without realizing that they are in a serious condition. They would not know that they could not see except straight ahead, until their fields were taken, and it was explained to them (R. 202). The patient would not know what is normal and what is abnormal. He did not tell Ettman of his condition (R. 206). Nor is there any evidence in the record to show that Ettman knew that he had retinitis pigmentosa.

The Company offered the testimony of several oculists to prove that petitioner had retinitis pigmentosa, but none of these testified that they ever told him. In 1918 he was sent to Barnes Hospital by Dr. Wiener for an examination. He received no treatment; his tests were negative (R. p. 83). He wore approximately the same glasses in 1928 that he wore in 1923.

The application for the insurance in question was made out in the handwriting of an insurance agent who obtained the information for said application from other policies that he had written for the petitioner, and he did not ask petitioner any question (R. 231). The Company's medical examiner, Dr. John Salter, produced his records of his examination, on which he had noted that the assured had **moderate myopia** (R. 152). He had examined the petitioner about two weeks previously on a $2,000.00 life insurance policy with the Northwestern Mutual Life Insurance Company, and in that application had marked "moderate myopia" (R. 155). A photostatic copy of said doctor's records appears in the record at page 152. After the words "ear, eye, etc.," on said record, appears the word "**yes**" in said doctor's handwriting, indicating that

he found something wrong with the applicant's eyes. Under the heading of "Remarks" on said record said doctor had written thereon the words "moderate myopia." He conveyed this information to the Company, although he did not write it in the said application (R. 163). On the said record of the doctor (R. 152), near the top of the page, on the right-hand side, appear the words "severe myopia corrected." There was a question as to when Dr. Salter wrote that. His testimony at the trial was inconsistent with his deposition previously taken as to when "severe myopia corrected" was written (R. 164).

Dr. John Green, an oculist, produced by the Company (R. 113), testified that as soon as myopia is mentioned, it brings to his mind the possibility of changes taking place later, including detachment of the retina (R. 104).

Several types of myopia are defined in the American Illustrated Medical Dictionary, such as malignant, axial, chronic, curvature and index. Malignant myopia is defined as a progressive myopia associated with the grave disease of the choroid, and leading to retinal detachment and blindness.

In the motion for rehearing, the attention of the Court of Appeals was called to the fact that it had failed to follow the Missouri law in connection with the aforesaid misrepresentation statute, failed to follow the Missouri law governing the issues of waiver, and that the Court had decided the case on a theory not relied on by either party or the court below (R. 321).

II.

QUESTIONS PRESENTED.

The principal questions presented are:

(1) Can a United States Circuit Court of Appeals in deciding a case "by-pass" a positive rule of state law decisive of the case in question, and thereby avoid the

effect of the rule laid down in Erie v. Tompkins (304 U. S. 64, 82 L. Ed. 1188) and other cases decided by this Court, by ignoring the issues squarely raised by the pleadings, instructions and briefs, by simply saying in the opinion, "The other contentions of the insured have been examined but do not require discussion" (R. 321).

(2) Can the Court of Appeals refuse to follow the construction of the Missouri Misrepresentation Statute, Section 5443, R. S. Mo. 1939, as applied to accident and health policies by the bench and bar of Missouri, including the trial judge and including counsel for both parties in the instant case, particularly where the Missouri courts have held the statute applies to both misrepresentations and **warranties?** [Cases cited under (2) Reasons for Granting the Writ.)

(3) Is the failure of an insurance company to plead and rely upon the defense of "**warranty**" a matter of substantive law or adjective law, where the state court has held that such constitutes a waiver? The state court has held that merely pleading the provisions of a policy in haec verba is not pleading a warranty (Brummer v. Ins. Co., 59 S. W. [2nd] 781; Wolfe v. Sup. Lodge, 160 Mo. 675, 61 S. W. 637).

(4) Can a Federal Court of Appeals decide a case on a theory upon which the case was **not** tried below?

(5) Where a construction has been placed upon a state statute by the appellate courts of that state, and generally accepted by the bench and bar, and there is no law holding to the contrary, has a federal court sitting in that state the right to carve out an exception and to require "compelling authority" or must the federal court show by what authority it refuses to follow the state rule and policy?

(6) Where a defendant has waived a defense under subdivision (h) of Rule 12 of the Federal Rules of Procedure, as shown by its pleadings, and by its requested instructions, can a federal court allow the defendant to assert such a defense by the Court's construction of the pleadings where under the state law the defense has been waived?

III.

REASONS FOR GRANTING THE WRIT.

1.

The question this Court is called upon to decide is of great importance. The effect of the rule in Erie v. Tompkins can be destroyed or greatly impaired if federal courts can refuse to pass upon an issue decisive of a case, and simply "by-pass" it. The Missouri courts have held in several cases that where an insurance company receives enough information to put it on notice, it waives any additional information if it does not request the same or does not request any further examination.

> Brummer v. Natl. Life Ins. Co., 59 S. W. (2d) 781;
> Loduca v. Ins. Co., 105 S. W. (2d) 1011;
> State ex rel. v. Allen, 303 Mo. 608, 262 S. W. 43.

The Court of Appeals for the Eighth Circuit itself has so held.

> Phoenix Mut. Life Ins. Co. v. Harmegnies, 110 F. (2d) 20.

2.

The Court of Appeals has decided the case at bar in the very teeth of the rulings made by this Court in **West v. American Tel. & Tel. Co.**, 311 U. S. 223; in **Six Companies of Cal. et al. v. Joint Highway District et al.**, 311 U. S. 180, 61 S. Ct. 186; **Stoner v. N. Y. Life Ins. Co.**, 311 U. S. 464, 61 S. Ct. 336, 85 L. Ed. 284, and **Fidelity Union Trust**

Company v. Field, 311 U. S. 169, where **this** Court held, that it is the duty of the federal courts to ascertain from all the available data what the state law is and apply it, irrespective of whether the Court of Appeals thinks that the Supreme Court of the state will at some later date modify the rule.

The Court of Appeals itself quotes from the law as announced by the Supreme Court of Missouri in **Lamport v. General Accident, Fire & Life Assur. Corp.,** 197 S. W. 95, l. c. 100, 272 Mo. 19 (R. 320), where that Court, referring to an accident policy, says:

> "* * * It has been held that a policy of this character, at least with reference to those portions providing indemnity for loss of life, **were** policies of life insurance, * * *. By like reasoning, such a policy, or at least so much thereof as relates to indemnity for loss of life, would likewise be a 'policy of insurance on life,' * * *."

In **Makos v. Ins. Co.,** 234 S. W., the Kansas City Court of appeals, construing this same statute, held:

> "It is claimed that Section 6142, R. S. 1919, concerning materiality of misrepresentation in procuring insurance, does not apply to policies of this kind. We think there is no merit in this contention."

In **Boillot v. Guar. Co.,** 83 S. W. (2d) 219, l. c. 223, the St. Louis Court of Appeals held:

> "The provisions of this section are applicable to accident policies such as is here in suit as well as to ordinary life policies" (citing cases).

In the above cases decided in Missouri by the appellate courts on the question of whether the Misrepresentation statute applies to accident and health insurance, the issues involved only accident or health indemnities. The

policies happened to contain provisions for indemnity in case of loss of life; in none of them, however, was suit brought for death indemnity. In no case in Missouri is there a holding that the misrepresentation statute does **not** apply to an accident and health policy where there was no death indemnity benefit. Has the Court of Appeals, therefore, a right to construe the statute contrary to the universally accepted construction placed upon the statute by the bench and bar of Missouri, including the trial judge and both counsel for the parties in the case at bar? The same statute, word for word, is the Kansas Statute, G. L. 1935, 40-418. While not controlling here, it is of interest and persuasive to note that the Supreme Court of Kansas held in Elliff v. Interstate Bus. Men's Acc. Co., 109 Pac. (2nd) 92, l. c. 95, 153 Kans. 177, that "the statute applies to health and accident policies" (1941).

3.

If federal courts can require "compelling authority" before they will follow rules of substantive law as declared by the state courts, as accepted and construed by the Bar, then the effect of the doctrine laid down in Erie v. Tompkins (supra) can be largely emasculated.

4.

There arises an important question regarding the construction of rule 12 of Federal Procedure, subdivision (h), relating to waiver. Under the Missouri law, where an insurance company relies on certain defenses, and so states either by letter or in its pleadings, it waives all other defenses (cases cited under Point 4, Argument). If federal courts can place a different construction upon such conduct of insurance companies, different from the Missouri law, then they are failing to follow the substantive law of the state.

5.

Where a United States Circuit Court of Appeals decides a case on a theory on which it was not tried below and not relied on by either of the parties or the trial judge, this Court has held, that the losing party has not had his day in court. Cases must be decided on appeal on the same theory presented below.

West Ohio Gas Co. v. Pub. Utilities Com., 294 U. S. 63, 55 S. Ct. 316;
San Juan Light Co. v. Requena, 224 U. S. 89, l. c. 96-97, 32 S. Ct. 399, 56 L. Ed. 680;
Thomas v. Taylor, 224 U. S. 73, 32 S. Ct. 403;
4 C. J. S., p. 465, par. 241.

6.

If there is only a warranty involved (we are firmly convinced the Court of Appeals is in error) then the opinion of the Circuit Court of Appeals is in conflict with an opinion of the Third Circuit in the case of **Ward v. Standard Accident Ins. Co.**, 30 F. (2d) 328, where the phraseology of the policy was almost identical with that in the case at bar, except that one of the phrases in the application is transposed and the Court of Appeals for the Third Circuit limited the defense to false representations and held there was no warranty.

7.

The opinion is untenable and is in conflict with the overwhelming weight of authority.

Home Life Ins. Co. etc. v. Fisher, 188 U. S. 726, 23 S. Ct. 380, 47 L. Ed. 667;
Kettenbach v. Omaha Life Ass'n, 69 N. W. 135;
Continental Life Ins. Co. v. Rogers, 119 Ill. 474, 10 N. E. 252;
Jenkins v. Co., 171 Mo. 375, 71 S. W. 688;
Glaser v. Ins. Co., 245 Mo. 377, 150 S. W. 549;

Schuerman v. Ins. Co., 165 Mo. 641, 65 S. W. 723;
Cooley, Vol 5, p. 4115;
2 Couch on Ins., p. 1464;
Ward v. Ins. Co., 30 F. (2nd) 328 (C. C. A. 3).

8.

The question is of great public importance. There are many thousands of health and accident policies outstanding in the State of Missouri and in other states having a "Misrepresentation Statute." The question is one of great importance both to the public and to the insurance companies.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Eighth Judicial Circuit, commanding that Court to certify and to send to this Court a full and complete transcript of the record and all proceedings in the case numbered 12,559, entitled on its docket Lester Ettman, appellant, v. Federal Life Insurance Company, appellee, at law, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; that the said judgment of said Circuit Court of Appeals for the Eighth Judicial Circuit may be reversed by this Honorable Court, and for such other and further relief as to this Honorable Court may seem meet and just.

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